



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
Washington, D.C. 20231
www.uspto.gov

Paper No. 3

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, LLP
1300 I STREET, NW
WASHINGTON, DC 20005

COPY MAILED

AUG 07 2002

OFFICE OF PETITIONS

In re Application of
Tuszynski, et al.
Application No. 10/042,696
Filed: October 3, 2001
Attorney Docket No. 7206.0021-00000

DECISION ON PETITION

This is a decision on the "Petition Under 37 CFR §1.53(e)," filed January 18, 2002, requesting that the attached papers be given the filing date of October 3, 2001, and that the petition fee be refunded.

The petition is **GRANTED**.

Applicants assert that, on October 3, 2001, they filed a request for Divisional Application under 37 C.F.R. §1.53(b), of pending prior application Serial No. 09/197,770. Applicants state that this request was filed with a complete copy of the prior application, including oath or declaration and drawings, as originally filed. This submission also included a substitute paper copy and computer readable form of the sequence listing, and a statement supporting the submission of the substitute sequence listing. Applicants acknowledge that the filing fee was not submitted. As of the filing of the petition, applicants had not received an Official Filing Receipt or a "Notice to File Missing Parts of Application." Having contacted the Office and been told that there was no record of this Divisional Application in the Patent Office's computer system, applicants filed the instant petition. As evidence that the application was filed, applicants submitted a copy of their return postcard receipt. Applicants also enclosed another copy of the papers they maintain were filed on October 3, 2001.

Applicants' arguments and evidence are well-taken. Upon review of the application file for the prior nonprovisional application No. 09/197,770 ('770), it was confirmed that most of the papers applicants maintain were filed in the Office on October 3, 2001 were misplaced. The papers present in the file of application '770, and bearing an OIPE receipt date-stamp of October 3, 2001, included a 77 page Specification, with at least one claim and an abstract; a Declaration and Power of Attorney; a Substitute Sequence Listing, but no Diskette; and a Statement to Support Filing and Submission in Accordance with 37 C.F.R. §§1.821-1.825 (These papers are the same as those resubmitted on instant petition). Thus, it is concluded that these papers are entitled to a filing date of October 3, 2001.

As to the other papers applicants maintain were filed, but are not present in the file of application '770, applicants' postcard receipt serves as *prima facie* evidence of their filing on October 3, 2001. See MPEP 503. The postcard is date stamped as received


in the Office of Initial Patent Examination (OIPE) on October 3, 2001; lists among the items being filed, a "Request for Divisional Application," "Drawings (22 pages)," and "Substitute Specification Listing (with Diskette);" and lacks any annotation of nonreceipt of any item denoted on the postcard. Thus, it is concluded that applicants have shown that these additional papers were a part of the original application disclosure filed on October 3, 2001, and are entitled to a filing date of October 3, 2001.

Petitioner authorized payment of the petition fee from their Deposit Account. However, given the basis for granting the petition, no petition fee is required and none has been charged.

The application papers determined to have been filed in the Divisional Application on October 3, 2001 (and the IDS filed January 18, 2002), have been placed in their own file jacket and assigned application Serial No. 10/042,696. Any future correspondence regarding this application should reference the newly assigned serial number.

Application No. 10/042,696 is being forwarded to the Office of Initial Patent Examination (OIPE) for processing with a filing date of October 3, 2001, using the application papers received in the Office on that date and the papers¹ resubmitted on petition filed January 18, 2002. Applicants will receive appropriate notifications regarding the fees owed, and other information in due course from OIPE.

Telephone inquiries related to this decision should be directed to Petitions Attorney Nancy Johnson at 703-305-0309.


Beverly Flanagan
Supervisory Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

¹ "Request for Divisional Application," "Drawings (22 pages)," and "Substitute Specification Listing (with Diskette)"